[2025] BIOT CA (Civ) 1

IN THE BRITISH INDIAN OCEAN TERRITORY COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT
MARGARET OBI, SITTING AS AN ACTING JUDGE
BIOT SC/15/2023 AND BIOT SC/16/2023

Field House, London
United Kingdom

Date: 16 December 2025

Before:

SIR HOWARD MORRISON, K.C.M.G, C.B.E, K.C., PRESIDENT
THE HON. MR JUSTICE LANE, JA
THE HON. MRS JUSTICE PLIMMER, JA
THE HON. MRS JUSTICE NOTT, JA
THE HON. MR JUSTICE LITTLE, K.C., JA

The Commissioner for the British Indian Ocean Territory v The King (on the application of VT and others) (Judicial Review: Unlawful Detention)

Mr. Rodney Dixon K.C., Mr. William Irwin, Ms. Anisa Kassamali, and Mr. Andrew Ratomski for the Appellant (instructed by the **Government Legal Department**)
Ms. Helen Law and Ms. Sarah Dobbie for the First Respondent **(**instructed by **Wilsons Solicitors)**
Mr. Chris Buttler K.C. and Mr. Jack Boswell for the Second and Fifth Respondents (instructed by **Duncan Lewis**)
Mr. Chris Buttler K.C. and Mr. Jack Boswell for the Third Respondent (instructed by the **Joint Council for the Welfare of Immigrants**)
Mr. Chris Buttler K.C. and Mr. Jack Boswell for the Fourth Respondent (instructed by **Bindmans**)
Ms. Helen Law and Ms. Sarah Dobbie for the Sixth Respondent (instructed by **Duncan Lewis**)
Mr. Tim Otty K.C. and Ms. Natasha Simonsen for the Seventh – Twelfth Respondents (instructed by **Leigh Day**)

Hearing date: 10-12 September 2025

JUDGMENT

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This judgment was handed down in court at 10:30am BST on 16 December 2025

This is the judgment of the Court

INTRODUCTION

1. The Appellant ('the Commissioner') has appealed against the judgment of The BIOT Supreme Court (Acting Justice: Judge Margaret Obi) dated 16 December 2024, which found that the Respondents were unlawfully detained throughout the period during which they were present on Diego Garcia in the British Indian Ocean Territory (BIOT). We shall hereafter refer to the Respondents as the Claimants for convenience.

FACTUAL BACKGROUND

The British Indian Ocean Territory (BIOT)

2. BIOT comprises more than 50 islands and is an uninhabited territory, save for a non-permanent population based on the territory's largest island: Diego Garcia.

3. BIOT is administered from London by a Commissioner who carries out the functions of both the government and the legislature.

4. On 30 December 1966, the governments of the United Kingdom and the United States of America (USA) signed an agreement to make BIOT available for defence purposes. A supplementary agreement was signed in 1976 which states that:

> Access to Diego Garcia shall in general be restricted to members of the Forces of the [United Kingdom] and of the [USA], the Commission and public officers in the service of the [BIOT], representatives of the Governments of the [United Kingdom] and of the [USA] and, subject to normal immigration requirements, contractor personnel.

5. Diego Garcia is of significant strategic importance to both the United Kingdom and the USA. There is a joint United Kingdom and USA facility on Diego Garcia, which covers about half of the area of the island. The remaining half is a restricted conservation area. There is a highway known as DG1. There are accommodation units alongside DG1 and an area known as 'Downtown'. There are very strict controls on who can and cannot enter Diego Garcia.

Factual summary

6. On 3 October 2021, a vessel containing the Claimants (apart from RG) arrived in the waters off BIOT, having got into difficulty on a purported journey to Canada. The vessel had suffered engine failure and was taking on water. The Royal Navy brought the vessel safely to Diego Garcia. The individuals on the vessel claimed international protection. Since that first arrival, six further vessels containing migrants have arrived in BIOT. RG arrived on 10 April 2022.

7. By September 2024, a total of 349 migrants had arrived in Diego Garcia on a total of seven vessels. 285 of the 349 individuals who had arrived on Diego Garcia subsequently left voluntarily: 135 flew back to Sri Lanka on flights arranged by the Commissioner and a further 150 departed in their own vessels.

8. At the time of the hearing before the BIOT Supreme Court, 56 asylum seekers (including 16 children) remained on Diego Garcia. Eight others were in hospital in Rwanda to receive medical care. On 2 December 2024, all the Claimants (save for KP) and the other migrants travelled to the United Kingdom.

9. Following their arrival in Diego Garcia, the asylum seekers lived in tented accommodation on Diego Garcia in an area about 100 by 100 metres known at Thunder Cove ('the Camp'), which is close to the military runway. The area was expanded modestly in April 2022 to accommodate a second toilet block.

10. The Camp was fenced off, save for an area which is bordered by thick bushes and trees. In November 2021, mesh wire suspended on posts was used to define the perimeter of the Camp. On 12 March 2022, 24 hour supervision by USA military personnel was replaced by supervision by G4S, a British multinational private security company.

11. On 2 July 2023, one of the Claimants, KP, left the camp and walked naked along DG1. He was returned to the Camp and attempted to harm himself. Later that same evening, after reports that KP was behaving aggressively, he was found to be in possession of a razor blade. KP was restrained and was taken to a building known as the Laundry Room. The following day he was transferred to a Short Term Holding Facility ('STHF') because of the risk he posed to others and himself.

12. The Commissioner promulgated a Restricted Movement Order (RMO) on 4 July 2023 ('RMO 2023').

13. On 18 August 2023, KP was charged with an offence of arson. On 26 October 2023, he was granted bail. Between 16 July 2023 and 9 March 2024, he remained in the

STHF but with supervised access to parts of the Camp. Thereafter, he returned to the Camp. However, on 13 June 2024, he was again removed for his own safety and that of others.

14. On 1 April 2024, VT pleaded guilty to an offence of criminal damage. He was sentenced on 30 May 2024 to imprisonment for one day. He was then taken to a tent outside the Camp.

15. A second RMO ('RMO 2024') was promulgated on 14 May 2024.

16. On 31 May 2024, KP was convicted of one count of arson and four counts of sexual assault. On 3 June 2024, he was sentenced to 20 months' imprisonment suspended for 12 months.

17. On 11 June 2024, VT was arrested and charged with further sexual offences. On 13 June 2024, he was released on bail and taken to the STHF. On 14 June 2024, he was remanded on bail to the STHF.

18. On 17 October 2024, KP was convicted of an offence of assault occasioning actual bodily harm and was sentenced to 24 weeks' imprisonment. He completed that sentence on 2 April 2025 and was transferred to the STHF on release.

19. On 1 November 2024, VT was sentenced to 3 years' imprisonment for sexual offences against a child. On 12 March 2025, VT was transferred to Monserrat to serve the remainder of his sentence.

Procedural History

20. The Claimants are 12 of the 64 asylum seekers referred to above. They are all Sri Lankan citizens of Tamil ethnicity.

21. On 18 December 2023, the Claimants issued applications for judicial review and a writ of *habeas corpus* in respect of their alleged detention on Diego Garcia.

22. On 21 December 2023, the BIOT Supreme Court approved a consent order in respect of the Claimants' application for interim relief. That order permitted them to visit a beach area close to the Camp for at least 90 minutes each day.

23. On 19 January 2024, the Commissioner filed Detailed Grounds of Defence.

24. On 19 February 2024, the BIOT Supreme Court made an in principle decision to hold the substantive hearing, including a site visit, on Diego Garcia.

25. On 2 April 2024, the Claimants (with the exception of VT, who was remanded to the Police Station) made an application for further interim relief (conveniently, if inaccurately, described by the representatives as 'bail'). That application, which was contested, was heard on 15 April 2024. On 22 April 2024, the BIOT Supreme

Court granted the application. 11 Claimants at any one time were given access between 9am and 5pm to a defined route outside the Camp.

26. Following concerns expressed by the USA authorities, the Commissioner applied on the evening 26 April 2024 for a stay of the order granting 'bail'. On 4 May 2024, the BIOT Supreme Court refused the Commissioner's application for a stay and granted a variation of 'bail' replacing the earlier order.

27. On 14 May 2024, the Commissioner promulgated RMO 2024.

28. On 24 May 2024, this Court dismissed the Commissioner's appeal against the decision of Judge Obi to hold the final hearing and a site visit on Diego Garcia.

29. On 26 July 2024, the conditions of 'bail' were extended with effect from 1 August 2024 to include access to a nature trail, a signposted 1.5km track through a woodland area which leads to a beach. At all times when exercising 'bail' the Claimants were to be escorted by G4S officers.

30. On 20 August 2024, this Court dismissed the Commissioner's appeal against the decision to grant 'bail' to the Claimants.

31. On 16 – 19 September 2024, the BIOT Supreme Court visited the Camp and conducted the final hearing at the Freedom Hall. On 16 December 2024, the Court handed down its judgment.

32. On 11 February 2025, the BIOT Supreme Court made an order giving effect to its judgment and refused the Commissioner's application for permission to appeal. This Court granted the Commissioner special leave to appeal on all grounds on 23 May 2025.

LEGAL FRAMEWORK

33. Section 3 of the Courts Ordinance 1983 provides:

> (1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory … the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England:
>
> Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary.
>
> (2) In this section specific law means –

(a) any provision made by or under a law (including this Ordinance) made in pursuance of section 11 of the British Indian Ocean Territory Order 1965, section 9 of the British Indian Ocean Territory Order 1976, section 10 of the British Indian Ocean Territory (Constitution) Order 2004, or any similar section superseding the last mentioned section;

(b) any provision of an Act of Parliament of the United Kingdom which of its own force or by virtue of an Order in Council or other instrument made thereunder applies to or extends to the Territory;

(c) any statutory instrument (as defined in the Statutory Instruments Act 1946) or prerogative Order in Council which applies to or extends to the Territory.

34. Section 10 of the BIOT (Constitution) Order 2004 provides:

(1) Subject to the provisions of this Order, the Commissioner may make laws for the peace, order and good government of the Territory.

(2) It is hereby declared, without prejudice to the generality of subsection (1) but for the avoidance of doubt, that, in the exercise of his powers under subsection (1), the Commissioner may make any such provision as he considers expedient for or in connection with the administration of the Territory, and no such provision shall be deemed to be invalid except to the extent that it is inconsistent with the status of the Territory as a British overseas territory or with this Order or with any other Order of Her Majesty in Council extending to the Territory or otherwise as provided by the Colonial Laws Validity Act 1865.

(3) All laws made by the Commissioner in exercise of the powers conferred by subsection (1) shall be published in the *Gazette* in such manner as the Commissioner may direct.

(4) Every law made by the Commissioner under subsection (1) shall come into force on the date on which it is published in accordance with subsection (3) unless it is provided, either in that law or in some other such law, that it shall come into operation on some other date, in which case it shall come into force on that other date.

35. The BIOT (Immigration Order) 2004 at [12] provides:

(1) The Commissioner or the Principal Immigration Officer may make an order directing that any person who is unlawfully present in the Territory shall be removed from the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order, or that any person not then present in the Territory shall not enter the Territory and shall remain out of the Territory, either indefinitely or for such period as is specified in the order.

(2) An order made under subsection (1) shall be carried into effect in such manner as the Commissioner or the Principal Immigration Officer may direct.

(3) A person against whom an order under subsection (1) is made directing that he be removed from the Territory may, if the Commissioner or the Principal Immigration Officer so directs, be held in custody, in such manner as may be so directed, until his removal from the Territory is effected.

Common law: false imprisonment

36. *Clerk & Lindsell on Torts*, 24th Edition at [14.24] states:

> False imprisonment is the unlawful imposition of constraint on another's freedom of movement from a particular place. The tort is established on proof of (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that imprisonment. For these purposes, imprisonment is complete deprivation of liberty for any time, however short, without lawful cause.

37. There is an extensive line of authorities concerning what constitutes imprisonment for the purposes of the first limb of the tort of false imprisonment. To constitute imprisonment, restraint must be complete, immediate and not conditional: *Bird v Jones* (1845) 7 Q.B. 742; *Iqbal v Prison Officers Association* [2010] QB 732 at [24] and [57]; *R v Bournewood Community and Mental Health NHS Trust ex parte L* [1999] 1 AC 458 at 486. There will be no imprisonment if there is a reasonable means of escape: *Robinson v Balmain New Ferry Co. Ltd* [1910] AC 295 at 262. The imprisonment must result from the direct act of the defendant which deprives the claimant of their liberty: *Iqbal* at [24] (*per* Lord Neuberger) and [80] (per Smith LJ). As Lord Dyson put it in *R (Lumba) v SSHD* [2011] UKSC 12; [2012] 1 AC 245 at [65]:

> All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58, 162C-D: "The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.

38. In *R (Jalloh) v SSHD [2020]* UKSC 4; [2021] AC 245, the United Kingdom Supreme Court sought to define imprisonment, the parties having accepted the following propositions (see [21]):

(i) Imprisonment is the imposition of restraint upon a person's liberty so that he is compelled at the will of a third person to stay within a defined boundary;
(ii) The restraint must be complete in the sense that he is required to stay within a defined area. There is no imprisonment if movement is blocked in one direction but he remains free to depart in a different direction;
(iii) It is imprisonment no matter how short the period;
(iv) The restraint must be immediate and not conditional;
(v) Complete restraint does not mean that there must be physical barriers such as locks or guards to prevent him or her leaving. Nor does it mean that it must be physically impossible to leave. She/he is imprisoned if she/he is made to stay by intimidation or threats, fear of the consequences, or submission to apparent legal authority.
(vi) It is also imprisonment if she/he is made to stay by the threat of imprisonment if she/he leaves, including the threat of arrest or prosecution. The threat does not have to be a threat to return them to the same place of confinement.
(vii) It is also imprisonment if she/he is only able to leave the defined area by an unreasonable means or route, for example, by jumping out of a first-floor window or risking prosecution by doing so.

39. In *Jalloh* [24], Baroness Hale said the following, by way of endorsement of the principles identified:

> 24. As it is put in *Street on Torts* , 15th ed (2018), by Christian Witting, p259, "False imprisonment involves an act of the defendant which directly and intentionally (or possibly negligently) causes the confinement of the claimant within an area delimited by the defendant." The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process. A good example is *R v Rumble* (2003) 167 JP 205. The defendant in a magistrates' court who had surrendered to his bail was in custody even though there was no dock, no usher, nor security staff and thus nothing to prevent his escaping (as indeed he did). The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.
>
> 25. In this case there is no doubt that the defendant defined the place where the claimant was to stay between the hours of 11.00 p m and 7.00 am. There was no suggestion that he could go somewhere else during those hours without the defendant's permission. This is not a case like *Bird v Jones* 7 QB 742where the claimant could cross the bridge by another route or *Robinson v Balmain New Ferry Co Ltd* [1910] AC 295 where he had agreed to go onto the wharf on terms that he could only get out if he paid a penny.

40. The second limb of the tort of false imprisonment requires there to be an absence of lawful authority to justify the imprisonment. This must be considered against well-established authorities that the common law jealously guards liberty. William Blackstone, in the *Commentaries on the Laws of England*, vol 1 (1765) ch 1, p134, states:

> Next to personal security, the law of England regards, asserts, and preserves the personal liberty of individuals … it is a right strictly natural … the laws of England have never abridged it without sufficient cause and … in this kingdom it can never be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.

And at p135:

> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject … And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient: for it is parliament only, or legislative power that, whenever it sees proper, can authorise the crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing.

41. This thread can be traced through *Secretary of State for Home Affairs and O'Brien* [1923] HL AC 603 and the Earl of Birkenhead's description of the writ of *habeas corpus* as:

> perhaps the most important writ known to the constitutional law of England … of immemorial antiquity … jealously maintained by courts of law as a check upon the illegal usurpation of the power by the Executive at the cost of the liege.

42. Lord Kerr confirms that the right to liberty is no less jealously protected in the 21st century in *Rahmatullah v Secretary of State for Defence* [2012] UKSC 48 at [41]:

> [the writ of *habeas corpus*] is not a discretionary remedy. Thus if detention cannot be legally justified, entitlement to release cannot be denied by public policy considerations, however important they may appear to be. If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified.

43. As to legal justification, the House of Lords in *R v Bournewood* held that it was lawful under the common law to restrict the liberty of a claimant who lacked capacity to the extent necessary to safeguard him and to administer necessary medical treatment. Necessity at common law may then provide lawful justification for detention where the detainee lacks capacity.

44. In *Austin v Commissioner of the Police of the Metropolis* [2007] EWCA Civ 989, the Court of Appeal upheld Tughendhat J's first instance decision that, in order to prevent a breach of the peace threatened by others, the police could lawfully take action which interfered with or curtailed the lawful exercise of the rights of innocent third parties, but only where all other possible steps had been taken to avoid a breach of the peace and to protect the rights of third parties, and where the action taken was reasonably necessary and proportionate. The parties acknowledge that *Austin* was not cited before the BIOT Supreme Court.

45. Lady Hale in *Jalloh*, considering *Bournewood* and *Austin*, rejected an importation into the common law tort of false imprisonment principles as they pertain to Article 5 deprivation of liberty, observing;

> Imprisonment for the purpose of the tort of false imprisonment can take place for a very short period of time, whereas a number of factors are relevant to whether there has been a deprivation of liberty. On the other hand, imprisonment may be justified at common law in circumstances which are not covered by the list of possibly permissible deprivations of liberty in article 5(1) of the ECHR [31].

<u>Principles relevant to onward appeals challenging findings of fact</u>

46. The applicable principles for an appeal court against findings of fact by a Trial Judge are well established. They were helpfully and comprehensively summarised by Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 W.L.R. 48 in the following way [2-3]:

Appeals on fact

The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was plainly wrong.

ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that she/he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in the judgment). The weight which the judge gives to it is however pre-eminently a matter for [the judge].

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

If authority for those propositions is needed, it may be found in *Piglowska v Piglowski [1999] 1 WLR 1360* ; *McGraddie v McGraddie [2013] UKSC 58, [2013] 1 WLR 2477* ; *Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5, [2014] FSR 29* ; *Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600* ; *Elliston v Glencore Services (UK) Ltd [2016] EWCA Civ 407* ; *JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176, [2019] BCC 96* ; *Staechelin v ACLBDD Holdings Ltd [2019] EWCA Civ 817, [2019] 3 All ER 429* and *Perry v Raleys Solicitors [2019] UKSC 5, [2020] AC 352* .

GROUNDS OF APPEAL

47. In the Memorandum of Appeal, the Commissioner relies on four grounds of appeal:

Ground 1: the Judge erred when she found that the Claimants were detained as a matter of law.

Ground 2: the Judge erred in law when she rejected the Commissioner's case on the defence of necessity at common law.

Ground 3: the Judge erred in law when she applied the *Hardial Singh* principles determining the lawfulness of the RMO 2023 and RMO 2024.

Ground 4: the Judge erred in her approach to determining the lawfulness of the RMOs by failing to have any or any adequate regard to the relevant evidence.

48. Mr Dixon KC, for the Commissioner, submitted that, in reaching her findings, the Judge had failed properly to take into account the particular security considerations pertaining on Diego Garcia. He stressed that this failure was relevant to all the Commissioner's grounds of appeal.

GROUND 1 – IMPRISONMENT / DETENTION

49. Mr Dixon KC took the Court to various documents which he claimed Judge Obi had not taken into account. The Commissioner submitted that the Judge erred in law in finding, as a matter of law, that the Claimants had been detained:

(i) The Judge was wrong to depart from the doubts expressed by the Divisional Court that the Claimants were detained on Diego Garcia, in *BAA and Others v Commissioner of BIOT* [2023] EWHC 767 (Whipple LJ and Chamberlain J);

(ii) Pursuant to section 3 of the BIOT Courts Ordinance, the BIOT Supreme Court had been required to consider the exceptional local circumstances on Diego Garcia;

(iii) The Judge had failed to determine whether imprisonment was direct and intentional;

(iv) The Judge's conclusion that the Claimants were not '*free to leave*' Diego Garcia conflicted with the authorities cited to her.

BAA

50. In *BAA*, the Divisional Court had to determine whether the application of the test in *American Cyanamid* prohibited the removal of individual Claimants to Rwanda, for medical treatment (see *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1). Under the heading "*Serious issue to be tried*" the Divisional Court said this (our emphasis):

> 75. The claimants submit that the underlying claims have a real prospect of success. The duty of care arises, they say, as a result of the relationship of detainer and

> detainee, citing *GB v Home Office* [2015] EWHC 819 (QB), see para. 59 of the claimants' skeleton argument.
>
> **76. We have doubts about whether it can be said that the Commissioner, or the administration of BIOT, is detaining any of the migrants. They are free to leave Diego Garcia at any time, and many of their number have left, with assistance from the administration. Some have stayed behind because they do not want to, or cannot, return to their country of origin; while they are on Diego Garcia, they are reasonably (so it appears to us) subject to some restriction on their movement, for their own safety and to ensure security at the defence facility.**
>
> 77. However, Ms McGahey did not invite us to refuse relief on this basis. For present purposes, we are prepared to accept that the claim does not fall within the category of cases described in *American Cyanamid* as failing to disclose any real prospect of succeeding at trial.

51. Mr Dixon KC submitted that (i) the Divisional Court was correct to doubt that the Claimants were being detained for the reasons given at [76] and; (ii) Judge Obi had been wrong to attach little or no weight to this view at [72] of her judgment. At [72] Judge Obi described the Commissioner's reliance on *BAA* as misplaced for these reasons:

> First, the tentative obiter remarks made by the Divisional Court cannot be reconciled with the Supreme Court judgment in *Lumba*. Being "free to leave" in the context of an unlawful detention claim must take into account whether that means going back to the country from which the detainee had cause to flee and give up a valid claim for international protection. Secondly, the Divisional Court was not referred to the decision in *Lumba* and it is not cited in the judgment. Thirdly, this Court has had the benefit of witness evidence and detailed legal argument on the question of detention.

52. The issues before the Divisional Court focused on the balance of convenience and the availability of interim relief (see [80-92] of *BAA*). The Divisional Court considered whether there was a serious issue to be tried and, whilst the fact of detention was part of that analysis, we note that Counsel for the Commissioner did not invite the Court to refuse relief on this basis (see [77] of *BAA* set out above).

53. It follows that the Judge was entitled find that the Commissioner's '*significant reliance*' (BIOT Supreme Court judgment at [71]) on the doubts expressed by the Divisional Court at [76] of *BAA*, was misplaced. Judge Obi correctly observed that the Divisional Court did not have the benefit of detailed submissions on the issue of detention. Likewise, although the court considered that restrictions on the movement of Claimants appeared '*reasonable*' it heard no detailed argument as to whether those restrictions amounted to imprisonment or had been authorised under the laws of BIOT.

54. Mr Dixon KC told us that the Commissioner no longer sought to argue that those Claimants with outstanding claims for international protection could be properly characterised as '*free to return*' to Sri Lanka.

55. The Commissioner's submissions must be viewed against the background history. The factual matrix had changed significantly over time. The Divisional Court had noted at [22] that, as at 30 March 2023, the Commissioner had made 14 (negative) decisions on international protection claims brought by some of the Claimants. However, those decisions had been withdrawn on 21 September 2023. As Judge Obi noted at [12], by the time of the hearing before her in September 2024, RG and KP had both received positive non-refoulement decisions; the others had outstanding claims either as the main applicant or as a dependent. After the hearing but before promulgation of the BIOT Supreme Court's judgment (16 December 2024), all the Claimants, save KP and VT, were flown to the United Kingdom, given permission to enter and leave to remain for six months. The Divisional Court did not have the detailed evidence concerning the circumstances of the Claimants which was later put before Judge Obi. As at September 2024, all the Claimants had either received positive decisions or still had active claims for international protection.

Applicable law and role of section 3 of the BIOT Courts Ordinance

56. Mr Dixon KC told us that the Commissioner did not take issue with the legal principles regarding false imprisonment as summarised in the legal framework above, nor did he suggest that the common law position should be reviewed in the light of section 3 of the BIOT Courts Ordinance. Rather, the Commissioner's complaint focused on the application of the law to Diego Garcia, particularly in the light of the unique security concerns which exist there.

57. We are satisfied that Judge Obi was fully aware of the exceptional circumstances on the island and had these in mind in reaching her judgment. In particular, the Judge specifically directed herself to these facts: Diego Garcia is a small (12 square miles) island military facility [1] that has served as a key strategic location for military operations pursuant to the 1976 Exchange of Notes between the United Kingdom and USA governments [2]; its territory is uninhabited save for a transient population who must serve there without their families [3]; there are classified military installations, some of which are not fenced off [4]. In addition, the Judge recorded the submissions on behalf of the Commissioner as including the need to safeguard the military facility and safety of the Claimants [59 and 60]. The Judge had at the forefront of her mind the sensitivity of the security concerns posed on Diego Garcia and the obvious need to restrict the Claimants' movements on the island. The Judge said this at [70] (our emphasis):

> … The Commissioner argues in his RADGD that the Claimants 'are being kept out' of the military facility 'rather than kept in' the Camp. The Claimants submit that this is a distinction without a difference. I agree. **There can be no doubt that on any military base (let alone a joint UK/US military facility such as Diego Garcia with a high level of strategic importance) there will be sensitive areas, access to which must be restricted. This is nothing more than common sense. The Commissioner accepts that some parts of the island are more sensitive than others and the Claimants readily acknowledge that they should be prohibited from accessing important military sites.** Therefore, the issue is whether the line the Commissioner has drawn constitutes detention; not whether the restriction on movement can be characterised as 'being kept out' or 'kept in.'

58. The Judge also rejected the Claimants' submission that the promulgation of RMOs, with purported criminal penalties for leaving the Camp, put beyond doubt the question of detention. The Judge again fully accepted the need for restrictions on movements, stating at [72] (again, our emphasis):

> The Divisional Court decision was made before the RMOs were enacted but I do not accept the Claimants' submission that once there was a legal basis, with purported criminal penalties for leaving the Camp, that puts beyond doubt the question of detention. **There must be some restrictions on the Claimants' movements (which they accept)** and a lawful RMO is an appropriate mechanism for achieving that aim; the key question is whether the restrictions that have been imposed amount to detention.

Direct and intentional

59. The Commissioner argues that Judge Obi failed to address the submission that the detention of the Claimants was not direct and intentional. We disagree. Indeed, Judge Obi addressed this issue head on. After referring to the role of G4S guards providing 24 hour supervision at [64] the Judge said this at [65]:

> The Commissioner suggests in his RADGD that the detention of the Claimants 'is not caused nor intended by the Commissioner … It is a consequence of the interlocking geographical and security situation on Diego Garcia, not the actions of the Defendant.' I am unable to accept that submission. At all times, the Camp has been administered by BIOTA personnel and contractors under the authority of the Commissioner. The Claimants are not permitted to leave the Camp without the approval of the Commissioner, his officers, or agents. It was made clear to the Claimants from the outset that military personnel or G4S officers would prevent any attempt to leave and, if necessary, force would be used to ensure compliance. The confinement was direct and intentional. Leaving to one side, the legality of the RMO 2023, that order reflected the reality of the restrictions placed upon the Claimants from the very beginning.

60. Judge Obi noted that the Claimants were unable to leave the Camp without approval and that force would, if necessary, be used to ensure compliance. The Judge concluded that '*the confinement was direct and intentional*'. That conclusion seems to us inevitable in the light of the following undisputed facts (as outlined in the Claimants' skeleton argument before us and not challenged by the Commissioner): at all material times, the Camp has been administered by the Commissioner through his contractors, including G4S; when the Claimants arrived on Diego Garcia, the Camp was an open area; shortly after their arrival, plastic fencing was erected to demarcate the boundary of the Camp and, in November 2021, this was replaced with wire fencing; although there are gaps in the fencing, these gaps were either guarded or a bordered by the ocean; from the outset, the Claimants were told they must remain within the confines of the Camp; since the purported enactment of the 2023 RMO, the Commissioner threatened the Claimants with criminal sanctions if they left the Camp (or the secondary accommodation) without a reasonable excuse; initially, the Camp was guarded around the clock by USA military personnel with responsibility transferred to G4S contractors in March 2022, the Claimants were escorted by G4S officers when they left the Camp to go to the beach (pursuant to the interim relief

order dated 21 December 2023), the 'Chapel' (where they were taken to communicate with their legal representatives), the 'Downtown' area (where they were taken for medical appointments), and when they were accessing 'bail'; individuals who left the Camp were said to have 'absconded'; the Commissioner implemented a procedure to be used in the event of absconding; records from G4S show that those leaving the Camp received punishment, including deprivation of 'privileges' such as coffee and cigarettes.

61. Given these circumstances, it is plain that the Commissioner utilised the methods identified by Lady Hale in *Jalloh* as indicia of detention: physical barriers, in the form of the wire fence; people, in the form of G4S officers, who guarded the camp and forcibly returned absconders; threats of force and legal process, pursuant to the RMOs; and punishments for absconding. The Commissioner continued to prevent the Claimants from leaving the Camp even after they had been granted interim relief by this Court on 23 April 2024. For example, shortly after 9.00 am on 25 April 2024, when 'bailed' Claimants approached the exit of the Camp, they were instructed by G4S officers not to leave. Additional G4S officers then arrived to guard the exit of the Camp. The Commissioner continued to prevent the 'bailed' Claimants from leaving the camp until 2 May 2024.

62. Notwithstanding the Commissioner's reliance on the uniquely sensitive nature of this military island base, interim relief eventually permitted the Claimants to enter areas beyond the confines of the Camp: these areas included the nature trail, road and beach. The Commissioner argues that the difference between Camp confinement and permission to access other parts of Diego Garcia is of little significance. As submitted by Mr Buttler KC that argument is relevant to the matter of damages, which is not before us, and not the indicia of detention.

63. The Commissioner's case has been put on the basis that, whilst the *Jalloh* indicia of detention may have been present, a direct intention to detain was not and any confinement was a consequence of the security considerations on Diego Garcia. Mr Dixon KC submitted that the Commissioner did not intend to confine the Claimants; rather, he intended to restrict movement in accordance with imperative security requirements at a highly sensitive and potentially hazardous military facility. The Commissioner submits that he did not wish to accommodate or manage the Claimants at all; it was the Claimants' sudden and unexpected arrival in the sensitive military facility which had forced him to restrict their movement.

64. It is not disputed that the Judge had to satisfy herself of the primary requirement that confinement was direct and intentional or negligent – see [24] of Lady Hale's judgment in *Jalloh* (*supra*) and *Lumba* (*supra*), *per* Lord Dyson at [65]. That is precisely what the Judge did. She found that the confinement of the Claimants was unambiguously direct and intentional. The fact that the Commissioner was in a difficult position and had to manage a situation that he did not want, does not mean that the Commissioner did not intend to confine the Claimants or that the confinement did not constitute detention. It is important to distinguish between the first element of the tort of false imprisonment, the fact of imprisonment, which the Judge addressed at [63-82] of her judgment and the second element of the tort, the absence of lawful authority to justify, addressed

from [83]. The reason or justification for the detention, including the management of a difficult situation involving security concerns, is relevant to the second element and not the first.

'Free to leave'

65. The Judge addressed in detail at [67] to [72] of the judgment the Commissioner's submission that the Claimants were not detained because they were '*free to leave*'. The Commissioner placed particular emphasis on this aspect of the Judge's reasoning in support of the following written submissions: there was not a complete deprivation of the Claimants' liberty – they could at any time have followed the other 285 claimants and left Diego Garcia and, in consequence, the Claimants had not experienced a complete loss of their freedom; at all times, the Commissioner had been willing to assist them to leave; the Commissioner did not force the Claimants stay on Diego Garcia.

66. It is important to understand the precise way in which Mr Dixon KC articulated the challenge to the Judge's '*free to leave*' analysis during his oral submissions. Whilst at times Mr Dixon KC appeared to suggest that the Claimants could be expected to return to Sri Lanka, he confirmed, during the course of his reply, that the Commissioner did not argue that those Claimants who had already received positive non-refoulement decisions or those with outstanding claims for international protection could return to Sri Lanka. Rather, he submitted that the Claimants were free to: (i) return to Sri Lanka *if* they believed that they no longer feared persecution there or; (ii) go to another territory (eg. Reunion Island) as others had done.

67. The Claimants rely on passages in *Lumba* and the House of Lords' decision in *A v SSHD* [2004] UKHL 56; [2005] 2 AC 68, to support the submission that they were not 'free to leave' Diego Garcia to return to Sri Lanka. We accept the Commissioner's submission that these authorities were not concerned with the question of whether individuals were detained as a matter of law. Both cases were concerned with the exercise of detention powers and must, of course, be read in context.

68. In *Lumba*, Lord Dyson said this at [127] (our emphasis):

> It is necessary to distinguish between cases where return to the country of origin is possible and those where it is not. Where return is not possible for reasons which are extraneous to the person detained, the fact that he is not willing to return voluntarily cannot be held against him since his refusal has no causal effect. But what if return would be possible, but the detained person is not willing to go? Here it is necessary to consider whether the detained person has issued proceedings challenging his deportation. If he has done so, then it is entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings (unless the proceedings are an abuse). In those circumstances his refusal to accept an offer of voluntary return is irrelevant. **The purpose of voluntary return is not to encourage foreign nationals to return to their countries of origin where, if their legal**

> **challenges succeed, it is likely to have been demonstrated that they would face a risk of persecution within the meaning of the Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmd 3906) or treatment contrary to article 3 of the ECHR. Rather, it is to facilitate removal where that is justified because the [foreign national prisoners] have not proved that they would face the relevant risk on return. In accepting voluntary return, the individual forfeits all legal rights to remain in the United Kingdom.** He should not be penalised for seeking to vindicate his ECHR or Refugee Convention rights and be faced with the choice of abandoning those rights or facing a longer detention than he would face if he had not been offered voluntary return.

69. We do not understand the passage highlighted above to say anything controversial nor is it fact-sensitive. Lord Dyson was articulating a well-established principle that adverse inferences should not be drawn against a person for not accepting voluntary return to their country of origin if they have an outstanding international protection or Article 3, ECHR claim. Lord Dyson was not suggesting that any Claimant was, for that reason, detained and neither was Judge Obi. The principle that a person should not be expected to make a voluntary departure to Country X, where they claim to fear persecution, does not mean that they are detained but, if the only place to which they can travel is Country X, then they are not '*free to leave*'. The principle does mean that those with outstanding international protection claims cannot be said, without more, to be '*free to leave*'.

70. In our judgment, the Judge was entitled to find, as she did at [67] and [69], that it cannot be properly said that the Claimants were '*free to leave*' in order to return to Sri Lanka when they had either outstanding international protection claims or had received positive decisions on their claims. As the Judge said at [69], the Commissioner's submissions before her " *… appeared to miss the point that the underlying principle in Lord Dyson's analysis was that a person should not have to choose between their freedom and being sent back to a place where they may face torture and persecution.*" In other words, an asylum-seeker should not be forced to accept *refoulement* as the price of liberty. As the Commissioner properly accepts, the Claimants' right to non-refoulement under customary international law is the same as the right to non-refoulement under the Refugee Convention – see [26] of *R (AAA (Syria)) v SSHD* [2023] UKSC 42; [2023] 1 WLR 4433.

71. The '*free to leave*' argument, therefore, rests on the Commissioner's belated submission that the Claimants could have departed by boat to an alternative third country. That submission faces a straightforward but significant hurdle in this appeal. This line of argument was not deployed before the Judge below, wherein the Commissioner focussed entirely upon the submission (no longer maintained) that the Claimants could return to Sri Lanka. Indeed, the Commissioner's changed approach is reflected in his written submissions before Judge Obi, which make no reference to the option of the Claimants being able to depart to a third country. Instead, the Commissioner put forward this submission at [26] of his written closing submissions before Judge Obi:

> Whilst of course the Claimants are in a very difficult situation and are entitled to have their claims for international protection considered (in as much as some have yet to be determined) the fact is they choose to remain in Diego Garcia rather than return to

> Sri Lanka. Whilst this is a sensitive and difficult matter, the reality is that on their own case their fear of persecution that causes then to remain accommodated at Thunder Cove and to live on Diego Garcia. It is not caused by the [Commissioner].

72. Indeed, prior to the hearing before us, no potential third country appears to have been identified. This was not rectified in the Memorandum of Appeal or the Commissioner's skeleton argument. Reliance upon the Claimant being free to leave to go elsewhere other than Sri Lanka has, therefore, been raised far too late. In any event, the submission is rejected. Before us and for the first time, the Commissioner relied upon evidence that indicated that other migrants had left Diego Garcia for Reunion Island (a territory of France) on their own or other available boats. That submission must be considered in the context of the Judge's factual findings and the dearth of evidence regarding departure by boat to Reunion Island as a realistic option.

73. The Judge was entitled to make the factual findings she did at [70] of the judgment: there was undisputed expert evidence that the Claimants' boat was unseaworthy; the Claimants were penniless and vulnerable, with no access to food, water, fuel, navigational or safety equipment for the journey. In addition, the evidence available to the Judge describes the waters around the island as unsafe and notes the presence of sharks and stingrays. The evidence also suggests a long and arduous journey of at least 1500 nautical miles to Reunion Island. We note that some of the Claimants have young children.

74. We were taken to a document that summarised the available data on boat departures to Reunion Island. However, Mr Dixon KC was unable to tell us how many of those who left for Reunion Island by boat shared the circumstances of the Claimants described in the paragraph above. The chronology suggests: that the fourth boat arrived in Diego Garcia in August 2022 but departed that same month; the fifth boat arrived in September 2022 and departed in October 2022; the sixth boat arrived in December 2022 and departed that same month. Most of the Claimants arrived on the first boat (now agreed to be unseaworthy according to expert evidence to that effect) and there is no cogent evidence that they had any realistic opportunity to depart on boats arranged and financed by others. We note that [41] of *BAA* refers to the publication of a statement on the process for determining protection claims, pursuant to the Removal Order (Process of Determination) Regulations 2022 (SI 7/2022). In that statement, the Commissioner says that the migrants are not being detained and that, '*they are free to leave if they can make proper arrangements to be collected; no assistance will be given to a collecting vessel and no repairs to existing vessels will be undertaken*'.

75. There were, therefore, serious obstacles preventing the Claimants leaving Diego Garcia by boat: their own boat was unseaworthy and there is no reliable evidence that they could board other boats; indeed, at the time, neither they nor the Commissioner suggested that they might leave by this route. It is an argument which has only ever been advanced before us and not previously. It is also relevant that these Claimants continued to pursue their asylum claims, which (save for RG) had been made as long ago as October 2021. By leaving Diego Garcia, they would potentially abandon those claims, which may well adversely impact on international protection claims made elsewhere. They also run the risk

of enforced return to Sri Lanka by a third country contrary to the *non-refoulement* provisions of the Refugee Convention – see [20] of *AAA* (*supra*).

76. The Claimants did not have any viable option to leave Diego Garcia and the Judge was entitled to reject the Commissioner's submission that they were '*free to leave*'.

Conclusion on ground 1

For the reasons set out above, we do not accept the Commissioner's submissions that the Judge was wrong or materially erred in law in accepting that the Claimants were detained as a matter of law, and in the premises the Judge was entitled to conclude that the first ingredient in the tort of false imprisonment was met.

GROUND 2 – NECESSITY

77. Having rejected Ground 1 and having affirmed Judge Obi's decision that the Claimants were detained, we turn to the lawfulness of that detention at common law.

78. In his Memorandum of Appeal, the Commissioner avers that the Judge erred in law when she rejected the Commissioner's case on the defence of necessity at common law. His single submission is that *Bournewood* affirms necessity as a defence to a claim of false imprisonment in tort, and that, pursuant to proper application of section 3 of the Courts Ordinance, necessity justified the Claimants' detention due to significant risks posed to and by the Claimants '*if they were free to wander around the island outside of the camp*' [80]. In relation to VT and KP, specifically he avers that it '*was absolutely necessary to keep them separate from the other Claimants for the latter's safety when they were under investigation for, and then convicted in respect of, serious offences … The measures taken in order to separate them from the general cohort were absolutely necessary in light of the exceptional circumstances pertaining on DG and their own criminal behaviour*' [82]. Those brief submissions are repeated, but not expanded upon, in the Commissioner's Skeleton Argument [96-100]

79. Accepting that *Bournewood* concerns detainees that lack mental capacity, which is not the position here, the Commissioner seeks to extend the doctrine to cases involving capacitous claimants. To that end, he relies on the following *dicta* of Lord Goff p490 Paras B-D:

> The concept of necessity has its role to play in all branches of our law of obligations - in contract (see the cases on agency of necessity), in tort (*see In re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1), and in restitution (see the sections on necessity in the standard books on the subject) and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law.

80. In response, Counsel for the Claimants rely, generally and in the specific circumstances additionally relevant to KP and VT, on the jealous guarding of the fundamental right to liberty over centuries, starting with Blackstone in 1765, maintained through O'Brien in 1923, and guarded equally jealously more recently *per* Lord Kerr in *Rahmatullah*.

81. The Claimants' joint Skeleton Argument makes the following submissions on Ground 2:

    (i) The defence of necessity is not available in law: it is confined to cases where the detainee lacks mental capacity [68]; the Commissioner has not identified any authority for the proposition that detention can be justified by necessity for reasons of security where the detainees have capacity and object to their detention [71].
    (ii) Judge Obi was correct to find that necessity was not made out factually; the Commissioner does not aver that her findings of fact were wrong [72 -75].
    (iii) In relation to KP and VT the Commissioner had open to him, but did not utilise, specific powers available to him to mitigate the risks posed by KP and VT's criminal offending, including the power to impose bail conditions after charge pursuant to the Police and Criminal Evidence Ordinance 2019, [78] and could have imposed pre-charge conditions by way of sexual risk order or sexual harm prevention order under section 3(1) Courts Ordinance and ss. 103A and 122A of the Sexual Offences Act 2003, England and Wales.

82. In oral argument on behalf of KP and VT, Miss Law described the Commissioner's position as '*not arguing for heat of the moment risk to life necessity; he is arguing for executive preventive detention for a period of months*'. On this proposition, Miss Law relied on Irwin LJ's statement in *R(AC) v SSHD* [2020 EWCA Civ 36; '*No risk can justify preventive detention: that is clearly outwith the statutory power of the Secretary of State.* [39].' She developed her submissions as to the specific legal options to detain available to the Commissioner – both in respect of the circumstances of detention generally and those specific to her clients – including, in KP's case, the statutory provisions under the Mental Health Act 1983. She pointed out that the Judge had set out at [122] the specific alternatives open to the Commissioner in respect of the detention of KP and VT, findings which are not subject to appeal. Miss Law submitted in conclusion in respect of KP and VT that '*the Commissioner was not across the many legal powers that he did have; rather he wishes to rely on a nebulous common law doctrine that may or may not exist*.'

83. In their oral submissions Mr Otty KC and Mr Buttler KC adopted Miss Law's 'specific powers' submission and all three Counsel developed it to cover the Claimants generally. Primarily, the Claimants rely on the Commissioner's ability to legislate swiftly and unilaterally pursuant to section 10 of the BIOT (Constitution) Order 2004 as fatal to his purported lawful justification of necessity: '*Subject to the provisions of this Order, the Commissioner may make laws for the peace, order and good government of the Territory*.' Mr Otty KC described this as '*a wonderful arrow in the Commissioner's quiver*.'

84. Counsel for the Claimants submit that the common law doctrine of necessity is simply unavailable: executive preventive detention cannot be justified where the Commissioner is at all times vested with legislative fiat. By definition, a defence

of necessity is a last resort; it is not available if other remedies are available but not employed.

85. As to necessity on the facts, in short the Claimants contend that proper assessment of the Judge's detailed ruling demonstrates that, far from ignoring the legal, political and geographical features of BIOT that make it unique, the Judge had these in mind when addressing the tension between the fundamental right of the individual to freedom and the political, national and international security imperatives of safeguarding Diego Garcia as a highly sensitive and strategically vital military base.

Reliance in oral submissions on matters not before Judge and not pleaded on appeal

86. In the Supreme Court, the Commissioner emphasised Lord Goff's statement in *Re F (the sterilisation case concerning an incapacitated adult)*:

> That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt.

87. Before us, Mr Dixon KC sought to develop his submission by reference to *Austin*, which concerned the '*kettling*' of members of the public in Oxford Street during a demonstration. The Commissioner had neither cited this authority before the BIOT Supreme Court nor in his Memorandum of Appeal or Skeleton Argument. Judge Obi set out the position before her at [86],

> *Bournewood* is plainly not authority for the proposition that the executive can detain individuals if it is deemed to be in their best interests. No authority has been provided to support the contention that detention can be justified on the grounds of necessity where the detainees have mental capacity and object to being detained.

Mr Dixon KC accepted that this accurately described the Commissioner's position advanced in the BIOT Supreme Court.

88. Mr Dixon KC drew our attention to Lady Hale's assessment of *Austin* in *Jalloh*, when she addressed the submission that the concept of imprisonment for the tort of false imprisonment should be aligned with the concept of deprivation of liberty within the meaning of Article 5 EHCR. Lady Hale observed at [30] that in *Austin*:

> The Court of Appeal held that 'kettling' the claimants for several hours at Oxford Circus was indeed imprisonment at common law, but that it was justified by the common law principle of necessity; however, it was not a deprivation of liberty within the meaning of article 5, a conclusion with which both the House of Lords and the European Court of Human Rights agreed.

On the facts of *Austin* the claimants had been detained for a period of around seven hours. Mr Dixon KC did not develop his submission, nor has he set out how *Austin* might support reliance on common law necessity to defend detention over months and years.

89. In response, the Claimants relied primarily on the fact that this point was not argued below and was not raised in the pleadings on appeal. Moreover, Mr Buttler KC submitted that *Austin* had been '*intensely fact-specific*.' Mr Otty KC referred to *Austin* as a '*wrinkle*' which suggests that '*the defence of necessity may, coincident with breach of the peace powers, be available to justify short term detention, but which falls far short of authority that detention for weeks, months or years could be lawful by reference to necessity*.' Miss Law submitted that the Commissioner's submission was underdeveloped, '*because as soon as it is properly considered, it is untenable*.' Dealing with the substance of the argument, such as it was, she submitted that, as *per Austin*, if there is no imminent breach of the peace then there is no common law power through necessity. Further, once detention is authorised under common law, the detainee must be released or brought before a court '*as soon as reasonably practicable.*' She concluded, '*the Commissioner is trying to run a necessity argument that is at best nascent, that in fact does not exist, while he failed to employ a legal option that does. He has fallen back on necessity – the articulation of which is apparently on-going – in circumstances where he had the luxury of time and did not use it.*'

90. We agree that the Commissioner's failure to formulate a submission before the BIOT Supreme Court that detention was justified in circumstances of imminent breach of the peace precludes the Commissioner from challenging the judgment on that basis before us. However, for the reasons set out below, we find that the submission would fail on its merits in any event.

Timing

91. The Commissioner's submissions regarding the period for which the defence of necessity might apply lacked any consistency. At first instance, he submitted that RMO 2023 was lawful; therefore, he sought to rely on necessity at common law until 4 July 2023. However, he does not appeal the Judge's finding that RMO 2023 was procedurally deficient and therefore unlawful. The consequences of this concession are not considered in his pleadings or in his written submissions; in oral argument, Mr Dixon KC appeared to concede that the invalidity of RMO 2023 meant that he would rely on the common law defence from date of arrival until the promulgation of RMO 2024 (14 May 2024). Therefore, the period for which he now says it was necessary to detain the Claimants by executive fiat is 2 years 1 month in the case of RG and 2 years 7 months in respect of the other Claimants.

Interplay between common law necessity and BIOT law

92. Ground 2 repeats the argument advanced in Ground 1, namely that section 3 of the Courts Ordinance required the Judge to apply the common law of England and Wales in the context of the geo-political circumstances on Diego Garcia, and that, had she properly carried out that task, she would have been bound to find that the Claimants' common law detention by the Commissioner over many months was justified by necessity. (Commissioner's Skeleton Argument [97] to [99]). However, while the question of whether or not the Claimants were detained is fact specific, whether their detention is lawful is a matter of pure law (as *per* Lord Steyn in *Bournewood*).

93. Nowhere in his written or oral arguments before Judge Obi or this court, has the Commissioner grappled with the inherent inconsistency in his approach to necessity. Diego Garcia's unique geo-political circumstances did indeed require particular care in securing both safeguarding of the Claimants and national and international security. However, the Commissioner possesses an extraordinary means of tackling those exceptionally challenging circumstances: he has both executive and legislative powers. Whilst any legislation he might enact could be challenged by way of judicial review, it would be not be subject to other judicial or, indeed, Parliamentary scrutiny. Section 10 of the BIOT (Constitution) Order enabled him, as he eventually did, to enact such restrictions that he deemed necessary and proportionate both to safeguard the Claimants and to maintain the security of the sensitive military site.

94. The detention of the Claimants having been established, the Commissioner has the legal and evidential burden of establishing necessity at common law. However, at no point has he sought to explain why he did not seek to use his authority to legislate and thereby lawfully to regulate the Claimants' movements on Diego Garcia. A RMO might be open to challenge on public law grounds but it could even go so far as to authorise detention for an objectively unreasonable period. We accept the Claimants' submission that section 10 of the (Constitution) Order works in conjunction with section 3 of the Courts Ordinance to provide a statutory route to and framework for lawful detention pursuant to BIOT law. That framework, with its inherent protections for the subject, vitiates any reliance instead on necessity at common law.

95. Although the Judge did not have the benefit of the submissions regarding necessity as a matter of law, it is clear to us that she properly applied the common law to the circumstances of the BIOT. She correctly held (our emphasis):

> There are few rights more important than the right not to be falsely imprisoned. Lord Brown in *Lumba* endorsed Lord Bingham's extrajudicial statement that the "*freedom from executive detention is arguably the most fundamental right of all*." In *R v Secretary of State for the Home Department, Ex p Khawaja* **[1984] AC 74 at 111**, Lord Scarman stated that "The writ of *habeas corpus* issues as of right". **As it is not a discretionary remedy, if detention cannot be legally justified, release from detention cannot be denied on the basis of policy considerations, no matter how important they may appear to be**. [83]

96. Thereafter, the Judge did not find it necessary to engage in detail with whether or not necessity was an available defence as a matter of law since she determined that, even if it was, on the facts '*the Commissioner has not come close to establishing that it is necessary for the Claimants to be detained*' [88]. We need not address her factual assessment since the Judge, having regard to the island's unique features, correctly concluded that the Commissioner's route to safeguarding and managing risk was via enactment of a lawful RMO.

97. From her judgment as a whole, and with particular regard to [85-88], it is clear to us that on the issue of necessity, as on the issues generally, Judge Obi was well aware that section 3 of the Courts Ordinance required her to construe the law of England and Wales compatibly with the local circumstances. She had conduct of

the proceedings throughout; she had determined a number of ancillary applications including applications for 'bail', or interim relief; she had the benefit of many witness statements, exhibits and of the oral evidence of key witnesses; she had the benefit of a site visit: she was extremely well-versed in local circumstances on Diego Garcia. Having proper regard to those circumstances, she took into account, as she was bound to, the legislative authority vested in the Commissioner by the (Constitution) Order 2004. She dealt with this squarely at [86] and [88]:

> It is sufficient, for present purposes, to note that the unique circumstances on Diego Garcia are highly relevant, but regardless of the significance of the US Commander's security role, it does not extend to insisting on restrictions that amount to the detention of the Claimants … . Such risks that exist can be mitigated via a lawful RMO.

98. There is no basis for us to interfere with the Judge's rejection of the Commissioner's reliance on necessity to justify in law the detention of the Claimants prior to the promulgation of RMO 2024.

Common law necessity to detain before legislation could reasonably be promulgated

99. We have considered the Judge's finding that, whether or not necessity was available to the Commissioner as a matter of law, it was not made out as a matter of fact such that the Claimants '*were unlawfully detained* ***from their arrival on Diego Garcia***' [132]. [our emphasis]

100. The arrival of the majority of the Claimants on 3 October 2021 was unexpected and unprecedented. There were immediate practical and logistical issues for the Commissioner to resolve; for example, interpreters and physical health checks were required whilst it was necessary to determine the intentions of the Claimants and to process any claims they might make for international protection. More immediately, arrangements for accommodating the Claimants and their children needed to be made on an island that is unused to housing civilians and does not accommodate children. The Commissioner needed to liaise with USA officials and with the FCDO.

101. We had the benefit of argument and authority which was not before Judge Obi. It is arguable that a defence of necessity at common law may not be confined to cases where the detainee lacks capacity, and that detention may, for a limited period, be justified by necessity for reasons of security. It seems to us that, through a concatenation of exceptional and unexpected circumstances, it may have been arguable before the BIOT Supreme Court that, in principle, a defence of necessity was available to the Commissioner in the early days of detention while he assessed the situation and rapidly took steps to issue a lawfully enforceable RMO. However, such an argument was never advanced before the BIOT Supreme Court and consequently it is unnecessary for us to make any ruling on the issue.

102. Accepting that the principles of the common law may, of course, evolve to meet the changing needs of society, Lady Hale held in *Jalloh* that to restrict the long-held understanding of false imprisonment at common law to a very different and much more nuanced concept of deprivation of liberty would be a '*retrograde step.*' It would risk a watering down of the centuries-old protections afforded an individual against unlawful imprisonment, whether by the state or by private persons [34]. We accept the Claimants' submission that the jealous guarding of the liberty of the individual requires any plea of necessity at common law to be anxiously scrutinised; it will be highly fact and time specific.

103. The Commissioner has never sought to rely on necessity to cover the challenging first few days while he made efforts to comprehend the Claimants' needs and intentions and considered what steps he needed to take to regularise the position. Instead, he has sought to rely on the doctrine to seek to justify his use of executive fiat in lieu of legislative fiat for over two years. We find that he cannot justify that as a matter of law. It is for the Commissioner to prove necessity of circumstance; he chose not to aver that executive preventive detention was necessary for a limited period, but rather to seek to justify its long-term use generally in lieu of legislation, and for a period significantly greater than any that could reasonably be justified.

104. As to the facts, the Commissioner adduced no evidence of how events unfolded in the first few days, of the reasoning and timing of his decision to detain the Claimants at the Camp, first by way of oral instruction and then by written notices, nor did he explain why it was impractical for him to impose the restrictions pursuant to the BIOT (Constitution) Order. As Mr Buttler KC put it in oral submissions, the Commissioner's case on necessity at trial drew no distinction between day one and day one hundred of the detention, and it was this case that Judge Obi was required to consider.

105. The Judge cannot properly be criticised for failing to deal with evidence which was never led, and argument that was never made. On the basis of the evidence and argument before her, the Judge was entitled to conclude that the Commissioner had not established on the evidence justification for any grace period, and that consequently he had failed to establish any lawful basis for the detention which began immediately upon the imposition of restrictions on the day of the Claimants' arrival. Accordingly, we find no basis upon which to interfere with her decision.

KP and VT

106. The Commissioner has made no submissions specific to KP and VT on necessity beyond the submissions he makes generally. We can therefore dispense briefly with his appeal as it relates to their non-criminally sentenced detention. We agree with Miss Law that:

    (i) Section 10 of the BIOT (Constitution) Order and the Police and Criminal Evidence Ordinance 2019, amongst other statutory provisions, invested in the Commissioner legal powers to detain KP and VT to protect others from their criminality;

(ii) The Commissioner's failure to use those powers but rather to assert necessity by executive fiat cannot justify detention as a matter of law;
(iii) The Judge's determination that there were as a matter of fact reasonably available alternatives to detention in the laundry room, the STHF and a makeshift tent, would in any event vitiate any plea of necessity.

Conclusion on ground 2

For the reasons set out above, we do not accept the Commissioner's submissions that the Judge Obi was wrong or materially erred in law in rejecting the Commissioner's defence of necessity at common law, and the Judge Obi was entitled to conclude that the second element of the tort of false imprisonment was met.

GROUND 3 - THE *HARDIAL SINGH* PRINCIPLES: RMO 2023 and RMO 2024

107. At [89-115], Judge Obi addresses the two RMOs. Both RMOs are in similar terms and *inter alia* require '*Relevant Persons ['all persons who are present in the Territory without permission']' not to leave the Camp or Secondary Accommodation 'without reasonable excuse.'*

RMO 2023

108. At [89-97], Judge Obi considered the lawfulness of RMO 2023 and concluded [96] that it was 'a nullity' in part because it had been enacted not by the Commissioner, but by Colvin Osborn, the Commissioner's Representative and Principal Immigration Officer. The Judge held that there exists no power in BIOT law to delegate the authority to make an RMO. At [92], Judge Obi recorded that '*Mr McKendrick KC [who appeared for the Commissioner in the BIOT Supreme Court] did not concede this point but it was not challenged.*' In the Commissioner's grounds to this Court [83] we read that '*the Commissioner does not seek permission to challenge the Judge's finding at [95-96] that the procedure used to bring the RMO 2023 into force was defective and therefore that that RMO was unlawfully introduced.*' That concession is made '*without prejudice to the Commissioner's position that, at all times, the passing of an RMO, whether that be the 2023 or 2024 RMO, fell within the scope of the Commissioner's powers*.'

RMO 2024

109. The parties agree that RMO 2024 did not suffer from the same procedural irregularities which had led the Judge to find RMO 2023 to be a nullity. However, at [98-115], Judge Obi concluded that both RMOs were '*ultra vires because [they are] an unreasonable and unlawful exercise of the Commissioner's legislative power under Section 10 of the Constitution Order, in all the circumstances*.' Judge Obi reached this conclusion in the light of *R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 70*.

110. Judge Obi summarises the so-called *Hardial Singh* principles at [99] quoting the comments of the Supreme Court in *Lumba*:

> *Hardial Singh* 1 (HS1) - the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (**ii) *Hardial Singh* 2 (HS2) - the deportee may only be detained for a period that is reasonable in all the circumstances**; (iii) *Hardial Singh* 3 (HS3) - if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect removal within a reasonable period, he should not seek to exercise the power of detention; (iv) *Hardial Singh* 4 (HS4) - the Secretary of State should act with reasonable diligence and expedition to effect removal. The *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997*, 1030 B—D) and to do so reasonably in the *Wednesbury* sense. [our emphasis]

111. Schedule 2 of the Immigration Act 1971 (as amended) provides that:

> where a person arriving in the United Kingdom is refused leave to enter' that person 'may be detained under the authority of an immigration officer…'

112. Before Judge Obi, the Claimants '*submitted that … the asylum seekers were detained under the RMO 2023, subject to a reasonable excuse to leave the Camp, while their claims for international protection were being processed*.' If their claims for international protection were rejected, they would then be subject to detention under section 12(3) of the Immigration Order 2004. The Claimants further submitted that '*the Secretary of State's powers of detention are subject to a reasonableness requirement and so is the Commissioner's power to direct the detention of the Claimants through the RMO 2023.*'

113. Before the BIOT Supreme Court, Mr McKendrick KC submitted that the *Hardial Singh* principles were not '*free standing*' and did not apply when removed from their specific statutory context. He accepted that '*analogous principles*' might apply pursuant to a power to a power to detain under the Immigration Order 2004 but no such power was being exercised. The Claimants were not being detained pending their removal but residing on Diego Garcia subject to the RMOs so *as 'to enable them to reside safely on a strategically important military facility pending determination of their non-refoulement claims pursuant to an agreed Statement on Process. The Hardial Singh principles are not pertinent to detention by reference to an order restricting movement in order to secure personal safety*.'

114. Rejecting that submission, Judge Obi [103] held that: (i) the process for considering an international protection claim in accordance with the Immigration Order 2004 is, in practical terms, identical to the process of detention and removal in the United Kingdom under the Immigration Act 1971; (ii) it is well established that the *Hardial Singh* principles apply both to the duty to detain pending the making of a deportation order under paragraph 2(1) of Schedule 3 of the Immigration Act 1971 (see *R (Francis) v Secretary of State for the Home Department [2015] 1 WLR 567)* and to the exercise of the power to detain pending removal under paragraph 16 of Schedule 2 to the Immigration Act 1971.

115. At [104], Judge Obi said that '*the Hardial Singh principles require modification, but the point made by the Claimants, is that detention under the Immigration Act 1971 is*

analogous to the situation of the asylum seekers.' The position of the Claimants and, indeed, that of the Commissioner was '*unique*.' Judge Obi accepted that the Commissioner could, in some circumstances, exercise a power to detain but '*the reasonableness requirement holds the executive accountable for its actions' including 'requiring 'all "Relevant Persons" to remain within the boundaries of the Camp'* [105].

116. The judge noted that '*over an extraordinarily long'* period of 35 months only two international protection claims had been determined. The 'Statement of Process,' by which the Commissioner intended to determine the international protection claims, had not been promulgated until the Claimants had been on Diego Garcia for more than nine months. Addressing first the procedurally defective RMO 2023, Judge Obi had *'no hesitation in concluding that'* had it been lawfully promulgated in July 2023, '*any lawful authority to detain had long expired*.' Although the making of RMO 2024 had been procedurally sound, '*for the same reasons'* it shared the fate of RMO 2023 and she found it was also *ultra vires*. She noted [105] that neither RMO contained '*an ouster*' that is any provision to detain for an objectively unreasonable time thereby excluding HS2.

117. In his grounds of appeal to this Court, the Commissioner argues that '*the Judge erred in law when she applied the Hardial Singh principles determining the lawfulness of the RMOs.*' First, the RMOs were not *ultra vires* but '*fell within the Commissioner's power.*' Secondly, the Judge had been wrong to apply the *Hardial Singh* principles outside the specific context of Schedule 2 of the Immigration Act 1971. She had wrongly held that the position of the Claimants was *'analogous to that of individuals in the United Kingdom in immigration detention subject to the statutory regime under the Immigration Act 1971*' [grounds, 88]. Thirdly, whilst she had acknowledged that the *Hardial Singh* principles required '*modification*' when applied to individuals on Diego Garcia, the Judge had made no such modification to the principles. To that extent, therefore, her analysis was incomplete.

118. The Claimants contend that Ground 3 relates only to the period from 14 May 2024, the date on which RMO 2024 came into force. The Commissioner does not challenge that contention although he asserts that he had the legitimate authority to make both RMOs. We accept that submission but it does not detract from the fact that RMO 2023 was a nullity for the reasons given by Judge Obi. The period with which Ground 3 is concerned begins on 14 May 2024.

119. The Commissioner submits that Judge Obi fell into legal error by applying the *Hardial Singh* principles divorced from their specific statutory context, the Immigration Act 1971. The principles are not freestanding but statute specific. The Claimants accept that HS1, HS3 and HS4 can only be exercised for the purposes of removal [skeleton argument, 83]. However, they contend that HS2 is an expression of principle underlying statutory interpretation generally, namely that a statutory power or duty to detain is subject to an implied limit that it must be exercised reasonably, unless the legislator expressly excludes a reasonableness requirement.

120. The Claimants submit that a duty to act reasonably arises from the '*principle of legal policy that by the exercise of state power the physical liberty of a person should not*

be curtailed or interfered with except under clear authority of law' (see *Bennion, Bailey and Norbury on Statutory Interpretation, 8th edition* at [27.2]). That principle, in turn, originates in Magna Carta [39]: *'No free man shall be seized or imprisoned … except by the lawful judgment of his equals or by the law of the land.'* Therefore, whilst a legislator can expressly authorise detention for an objectively unreasonable period, when a statute is silent as to an express authority to detain, a duty to act reasonably arises in order to uphold the fundamental common law right of the individual not to be subject to arbitrary detention.

121. We agree with the Claimants' submissions regarding the general application of HS2 for the reasons given by the Claimants. We consider that, contrary to the Commissioner's submission, the requirement of reasonableness stated in HS2 is a freestanding principle of the common law which applies to statutory provisions authorising detention of the individual which do not expressly exclude a reasonableness requirement. The principle is not confined to the Immigration Act 1971 nor does it need to be applied '*by analogy*' as Mr McKendrick KC had argued.

122. Our conclusion finds support in the highest authority. In *Tan Te Lam v Superintendent of Tai A Chau Detention Centre 1997 AC 97, 111B*, the Privy Council had *'no doubt'* that in conferring *'a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was so limited'*. Significantly, the duty to act reasonably in *Tan Te Lam* was not limited to detention pending removal but to administrative detention *per se.*

123. In the instant appeal, whilst the HS2 requirement to act reasonably remains unaltered, it was engaged in a different statutory context and in the particular conditions of Diego Garcia. We find that, in the absence of any '*ouster*' provisions in RMO 2024 of any express power to detain for an objectively unreasonable period, Judge Obi correctly sought to apply the general principle of law set out in HS2. She did not apply HS2 regardless of the different statutory context, as the Commissioner contends; there is nothing in her judgment, read as whole, which comes close to suggesting that the Judge applied HS2 as if the Claimants were detained under the Immigration Act 1971. We agree with the Claimants that '*once it is accepted that the Commissioner's power of detention was subject to a reasonableness requirement, the only question is whether it was open to the Judge to conclude that an objectively reasonable period was exceeded in this case based on her findings and evaluation of the facts*.' As we shall explain below, that is exactly what Judge Obi proceeded to do at [107-111].

124. Before us, we understood the Commissioner to accept that HS2 should apply to individuals whose international protection claims had been refused and who were detained under the Immigration Order 2004. He does not accept that HS2 applies to those who were subject to RMO 2024 pending determination of their international protection claims. The Claimants rely on *Regina (CSM) v Secretary of State for the Home Department [2021] EWHC 2175 (Admin*). In that case, Bourne J applied the *Hardial Singh* principles in circumstances where a claimant with HIV was detained pending hearing of his asylum claim; there appears to have been agreement between the parties that the requirement not to detain for an unreasonable period should apply notwithstanding that the claimant's asylum

appeal was pending. The reported judgment does not address the issue in any detail but, given that HS2 exists to protect a fundamental right of the individual, and noting the absence of any contrary authority cited by the Commissioner, we are satisfied that the Commissioner should have refrained from detaining any Claimant with an outstanding international protection claim for an objectively unreasonable period.

125. The primary arguments advanced in Ground 3 are, therefore, without merit. All that remains is the Commissioner's assertion in the grounds that the Judge erred in law by failing to make '*modifications*' in the application HS2 in the context of Diego Garcia despite having said that she would do so. At [108] of his grounds, the Commissioner states:

> If the Judge was applying a modified version of the English common law (which, as set out above, is a perfectly lawful and necessary approach in BIOT law) it was incumbent upon her to set out properly what modifications she was making; the reasons for any modifications to common law principles; and setting out the facts and/or submissions which she had taken into account when modifying the English law principles. She did none of these things (which was itself an error) and wrongly applied the Hardial Singh principles to determining the issue of whether or not the RMOs were *ultra vires*.

126. At [99] of the judgment, Judge Obi cites *R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888; [2003]* INLR 196. At [48], Dyson LJ provides examples of factors which will be relevant to determining objectively the question of reasonableness under HS2:

> [T]he length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences.

127. At [107-110], Judge Obi considered those and other factors in the light of her findings regarding the Claimants' circumstances on Diego Garcia. She noted the material squalor in which the Claimants were compelled to live in the Camp [108]; the '*extraordinarily long time*' it had taken the Commissioner to determine any of the Claimants' international protection applications (two applications in 35 months); the failure to facilitate medical examinations of the Claimants [107]; the tensions created in the United Kingdom/USA relationship on Diego Garcia by the continuing presence of the Claimants; the disturbing descent of some of the Claimants into self-harm and suicidal thoughts [109]; the '*negligible risk of the Claimants absconding*' [110]. Her conclusions are at [111] and [115]:

> 111. Having considered the factors referred to above I have no hesitation in concluding that by the time the RMO 2023 was promulgated in July 2023, any lawful authority to detain had long expired.
>
> 115. For the same reasons, as stated above, in relation to the RMO 2023, the RMO 2024 is ultra vires because it is an unreasonable and unlawful exercise of the Commissioner's legislative power under Section 10 of the Constitution Order, in all the circumstances.

128. We do not find that Judge Obi fell into legal error. However, we consider that the Judge's use of the word '*modifications*' was inapt. To modify is to make a partial or minor change or changes. However, HS2 articulates an immutable and fundamental principle of law. Such a principle may evolve over time, but the principle itself need not be changed or modified (see Lady Hale's remarks in *Jalloh).* We are satisfied that Judge Obi did not intend to change or '*modify'* HS2. In our opinion, it is tolerably clear that Judge Obi recognised that: (i) she was required to apply HS2 outside the specific context of the statute (the Immigration Act 1971) which had been under consideration in the case of *Hardial Singh* and which does not operate in Diego Garcia and; (ii) the application of HS2 should be informed by the facts as she had found them, in particular at [107-110]. That task did not require '*modification*' of the *Hardial Singh* principles. The parties were not left waiting for a '*modification*' of the principles which the Judge never delivered since no modification was required. We are satisfied that Judge Obi's analysis is not legally flawed for the reasons asserted by the Commissioner or at all.

129. The Commissioner has not directly challenged the judge's assessment of the evidence and the reasons she gave for finding that the RMOs were *ultra vires*. Whilst we acknowledge that the Commissioner's primary submission is that the Claimants were never detained and that the *Hardial Singh* principles do not apply, he has not argued that the period of detention was reasonable. On the facts, it is difficult to see how such an argument might succeed.

130. Regarding BIOT RMOs more generally we make the following observations. First, Judge Obi's finding that RMO 2023 and RMO 2024 were *ultra vires* is specific to those RMOs only. As we have observed elsewhere in this judgment, the Commissioner could have issued RMOs soon after the arrival of the Claimants on Diego Garcia. Had he done so, the factors (in particular, delay) which adversely affected the lawfulness of RMO 2023 and RMO 2024 may have had little or no relevance. Secondly, the Commissioner has the power to issue a RMO expressly providing for detention for an objectively unreasonable period; such a RMO might be challenged on public law grounds but it would not engage HS2.

Conclusion on Ground 3

The judge did not err in law by applying the *Hardial Singh* principles. The judge did not err in law by finding that RMO 2023 and RMO 2024 were *ultra vires*.

GROUND 4 – THE JUDGE FAILED TO GIVE ANY OR PROPER CONSIDERATION TO RELEVANT EVIDENCE

131. The Commissioner submits, without prejudice to Ground 3, that when determining what was and was not reasonable in terms of the restrictions of

movement to be placed on the Claimants, it was incumbent on the Judge to take proper account of the available evidence regarding the need for such restrictions. Articulated in that narrow way that would appear to be an unobjectionable principle. However, the Commissioner seeks to develop this submission by contending that the Judge failed, in that respect, to have any or proper regard to the evidence before her in relation to the specific and unique security concerns and necessary restrictions arising on Diego Garcia.

132. The Commissioner relies on four such alleged failures. They are:

First, the judge failed to include in her analysis any proper determination of the respective roles and responsibilities of the USA and United Kingdom authorities.

Secondly, the judge failed to have regard to the evidence before her as to the serious impact on the security of the facility and the safety of those in the Camp and more generally on Diego Garcia. It was submitted that the Judge failed to make any reference to the following: (a) two letters from Harriet Matthews, Director General at the FCDO dated 24 July 2024 which are directly relevant to security arrangements on Diego Garcia; (b) the first witness statement of Nishi Dholakia (the Deputy Commissioner for BIOT from 19 October 2023 until his appointment as the Acting Commissioner on 19 August 2024) setting out details as to the USA's security concerns and issues relating to migrant safety; (c) a letter from the Permanent Secretary at the Ministry of Defence making clear that the United Kingdom was not privy to USA assessments of sensitivity but stating also that operations could be compromised by the identification of the presence on the island of particular units or personnel.

Thirdly, the Judge failed to have regard to evidence available to her about the threat to security and the efficient operation of the military facility posed by Camp residents having even the limited access represented by grant of the 'bail'. Complaint is made that the Judge failed to make reference to a *Note Verbale* and Diplomatic Cable from the USA dated 12 June 2024 relating to the grants of 'bail'.

Fourthly, it is submitted that it was irrational to place any or any significant weight on what the Judge regarded as the lack of evidence that the limited additional access, permitted by the 'bail' grants, had caused any problems, especially when the Judge was aware that 'bail' had been suspended on several occasions. It was also submitted that the Judge had erred by placing any weight upon the supposed absence of evidence of difficulties arising from the grant of additional movement as part of interim relief.

133. The Commissioner submits that the effect of those four matters means that the Judge's conclusion, that the restrictions on movement represented by the RMOs were unlawful, was wrong in law. Her conclusion had been based on a selective assessment of the evidence leading to a finding which the Judge could not properly make on the evidence available to her overall.

134. The Claimants' interlinking submissions on this ground can be summarised as follows.

135. First, the Judge's conclusions on this issue were inevitable in light of her findings of fact on the evidence.

136. Secondly, it was for the Commissioner to establish that the restrictions were reasonable and the Judge, having visited Diego Garcia and having heard oral evidence on this issue as well as having considered numerous documents, was conspicuously well-placed to make that assessment especially given the length of the detention.

137. Thirdly, that any proper analysis of the judgment reveals that the Judge did consider all of the relevant evidence especially where it was subject to cross-examination and further, given the sheer number of documents, it was not necessary for the Judge to refer to every item of evidence.

138. Fourthly, the Judge, in the context of the various interlocutory applications, had given extensive consideration to the Commissioner's safety, security and diplomatic concerns such that it is unrealistic to contend that, having done so, she then went on to ignore them.

139. Fifthly, the weight attributable to particular items of evidence was for the Judge to determine and this ground amounts to no more than a disagreement with her legitimate assessment rather than a meritorious ground of appeal.

140. Sixthly, given the concession by the Commissioner that the RMO 2023 was unlawful, it is only the period between 14 May 2024 and 2 December 2024 that could be relevant to this ground and the Judge's findings of fact and conclusions on the RMO 2024 were plainly open to her on the evidence.

141. We were taken at some length to the evidence which the Commissioner contends the Judge failed to take into account. Reviewing this evidence, it became tolerably clear that this ground is based on a highly selective exercise by the Commissioner, which focuses on a small part of the evidence and which simply does not bear the import placed upon it by the Commissioner.

142. In addition, careful analysis of the judgment reveals that the Judge was aware of the unique and particular security concerns arising on Diego Garcia. The judgment specifically addresses the requirements of the military facility and importantly whether those requirements were necessary. Inevitably, in our judgement, that assessment was then inextricably bound up with the Judge's assessment of reasonableness. Further, it is unrealistic to ignore the fact that the Judge had, during the course of a number of interlocutory applications, considered extensive evidence of the security concerns. She was also well aware of the respective roles and responsibilities of the USA and United Kingdom authorities.

143. It is also important to bear in mind that, during the course of the substantive hearing on Diego Garcia, there was a one-day site visit conducted by the Judge to specific locations on the island. The Judge considered over 5,000 pages of evidence, and the hearing itself lasted three days and importantly involved the calling of evidence and cross-examination.

144. As this Court made clear in *R(VT and others) v Commissioner* [2024] BIOT CA (Civ) 3 at [48]*; 'The judge was not obliged to refer to every item of evidence before her'.* The suggestion that a Judge should refer to every piece of evidence in a claim such as this is not tenable.

145. Importantly, the Judge noted at [63], '*I have resisted the temptation to address every point that has been raised; concentrating only on such matters as have enabled me to conclude whether the claim (or part of the claim) should succeed*'. Such an approach was, in our judgement, plainly right.

146. The Judge was aware that 'bail' had been suspended on several occasions. It was for the Commissioner to adduce specific evidence of security concerns before the Court. Judge Obi was entitled to conclude that, had there been such concerns, they could have been put before her. In any event, her conclusion was not determinative of her assessment of the evidence. Further, the submission that the Judge ignored difficulties that arose in relation to the exercise of 'bail' is without merit. These were matters which post-dated the hearing and were not drawn to the Judge's attention.

147. Drawing the strands together, the Commissioner's criticisms, both individually and cumulatively, focus upon small parts of the evidence to the exclusion of the totality – particularly the evidence given in cross-examination. We do not accept that the Judge failed to have any or any proper regard to the evidence relied upon by the Commissioner. The evidence in total does not bear the weight given to it by the Commissioner and it does not come close to persuading us that the Judge's approach to this evidence was flawed in the way submitted.

148. We agree with the Claimants that it would have been impossible for the Judge to refer to and to address every piece of documentary evidence in her judgment. There was no requirement for her to do so and she cannot properly criticised for not doing so. In accordance with principle (iii) in *Volpi* (see [46] above) there is no compelling reason to doubt that the Judge considered all of the evidence. Moreover, it is clear that she was fully aware of the security concerns of the United Kingdom and the USA. The Judge's assessment of those concerns and the weight she gave them was a matter for her and her conclusion cannot be described as rationally insupportable (see principles (iv) and (v) in *Volpi).*

Conclusion on Ground 4

The Commissioner's assertion that the Judge failed to have any or any proper regard to relevant evidence is not established and this ground fails.

DISPOSAL

For the reasons we have given, we dismiss the Commissioner's appeal.